IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.294 OF 1999.

Dinkar Sopana Bhuruk & ors. : Appellants.

versus

Sitabai Tukaram Bhuruk & ors. : Respondents.

Mr.S.S.Redekar for the appellants.

Mr.P.G.Karande for the respondent No.1.

CORAM : D.G.DESHPANDE,J.

DATED : 7th March 2005.

ORAL JUDGMENT

1. Heard advocates for the appellants and Respondent No.1. The appellants are the original plaintiffs. They filed a suit for declaration and injunction in respect of a tenement of the MHADA. The suit came to be dismissed by the City Civil Court by its judgment and decree dated 22nd December 1998 and hence this appeal.

2. It was the case of the plaintiffs that they along with 18 ors and Tukaram - the deceased husband of defendant No.1 were occupying Room No.5 of Chawl No.2, Tejukai Mansion, Lalbaug, Mumbai. This room was called as common baithak for the villagers of Vinjar. This room was acquired from one Laxman Haribhau in 1947. The tenancy was by mutual agreement transferred in the name of Tukaram - the husband of respondent/defendant No.1 Tukaram having agreed not to claim exclusive right to the said room. The building where the room was situated required extensive repairs as it had become dilapidated condition in course of time. Therefore, the MHADA - defendant No.2, issued a notice for repairs and reconstruction in 1986 in the name of Tukaram. Tukaram died in 1990. Therefore, the notices of MHADA were served upon defendant No.1. Tukaram was obtained transit accommodation and since the transit accommodation was small, the other villagers were made their alternative arrangement. But the plaintiffs and defendant No.1’s husband Tukaram continued to reside in the transit accommodation. When after MHADA constructed new building, defendant No.1 tried to

get new accommodation for herself only. Therefore, the plaintiffs addressed notice to the MHADA - defendant No.2 for inclusion of their names in the list of occupants vis-a-vis the old room and, then consequently the suit came to be filed for a declaration that the plaintiffs are entitled to use new room that was allotted to defendant No.1 in lieu of old room and for permanent injunction restraining defendant No.1 from transferring the new room and/or transit accommodation to any third party. Defendant No.1 was the main contesting party and she denied all the contentions of the plaintiffs that the room was being used as common baithak for the villagers and asserted her exclusive right to the old room and, consequently to the new room. She contended that in the transit accommodation none of the plaintiffs ever came to reside and after her husband’s death in 1990 the transit accommodation was transferred in her name. Further, according to her the plaintiff No.1 was the closed relative of her husband and, because of his illness he requested Tukaram to accommodate him in transit accommodation. Therefore, the plaintiff was permitted to stay in transit accommodation for some time. But

plaintiff No.1 and his family members left the transit accommodation some time in 1992-93. She also contended that plaintiff No.1 and other villagers were allowed to quote addresses of old room as their address for the purpose of correspondence because they did not have address for such purpose. In this background of the pleadings both the plaintiffs and the defendant lead evidence documentary as well as oral. 10 + 2 issues were framed by the trial Court. The trial Court came to the conclusion that the plaintiff has failed to prove his case and, therefore, dismissed the suit. Hence this appeal.

3. The counsel for the appellants strenuously urged that the appellants/plaintiffs had tendered number of documents on record to show that the old room was used as common baithak for the villagers; that he was residing in the old room along with Tukaram; that he was residing in the transit accommodation along with Tukaram and defendant No.1, and therefore, he had a right to occupy the new room allotted by defendant No.2 to defendant No.1 i.e. by the MHADA.

4. The documents relied upon by the plaintiffs are the ration card, ESI card, rent bill of transit accommodation, Mill record and notices to MHADA etc. They are from Exhibit A to F and, therefore, these documents coupled with the oral evidence were sufficient to come to the conclusion that the plaintiffs were entitled to the reliefs sought.

5. As against this, it was argued by the counsel for the respondents that firstly, even though plaintiff was claiming that the old room was being used as common baithak for the villagers of Vinjar, the plaintiffs had not filed representative suit; that there was no evidence to come to the conclusion that the old room was used as common baithak; that mere temporary stay of the plaintiff either in the old room or in the transit accommodation did not give any right in the property to the plaintiff; that the wife of the plaintiff was brought in the transit accommodation under the permission granted by defendant No.1 because of the illness of the plaintiff or his wife; that there was complete and total inconsistency in the pleadings and the

evidence adduced by the plaintiff. Therefore, according Mr.Karande, the claim of the plaintiffs was rightly rejected by the trial Court and no interference is called for.

6. In this background it is necessary to see and find out what is the documentary evidence relied upon, produced and proved by the plaintiffs in support of their contentions, in addition to the oral evidence. The plaintiffs have produced and proved Exhibit A which is an Identity Card issued by ESI Corporation in the name of the plaintiff Dinkar. In that Identity Card the address of the plaintiff is shown as Room No.5 Tejukaya Mansion, Lalbaug. Second document is Exhibit-B which is an Employer Service Certificate issued by the Western India Spinning & Manufacturing Mills and the address of the plaintiff No.1 shown therein as Pratiksha Nagar i.e. the Transit accommodation. Exhibit-C (Collectively) are the extracts of various voters lists from 1956 to 1985. There are five voters lists in all and they are from 1956 to 1960; 1960 to 1964; 1967 to 1972; 1972 to 1977 and 1978 to 1985. In the first voters list of 1956 to 1960 four names are shown as occupants of

Room No.5 and the name of neither Tukaram nor the plaintiff figures in it. In the second voter list, there are five names, but neither the plaintiff's name nor the name of Tukaram - the husband of defendant No.1 figures in it. In the 3rd list from 1967 to 1972, there are eight names and one of them is of Plaintiff No.1 at Sr.No.4. The name of Tukaram or defendant No.1 does not figure. In the next voters' list from 1972 to 1977 there are ten names occupying Room No.5. The name of plaintiff is there, so also the husband of defendant No.1. And in the last voters' list from 1978 to 1985 the names of the plaintiff and Tukaram figure in it. Exhibit-D is the ration card of plaintiff No.1. It is in respect of Pratiksha Nagar i.e. the transit camp. Exhibit E is a rent receipt dated 23.1.1995 of MHADA paying rent for the transit accommodation. Exhibit F is the office copy of the statutory notice given to MHADA by the plaintiff. It is dated 14.07.1995. This notice was given to the MHADA requesting them to include the names of those persons including the plaintiff in the list of occupancy list and, also with a view as an intention of the plaintiff to file suit.

7. From all these documents, it is prima facie clear that out of the three plaintiffs at least plaintiff No.1 was originally staying in old Room No.5 and that he was also staying at Pratiksha Nagar i.e. transit accommodation which was given in lieu of old Room No.5 due to reconstruction of the building Tejukaya Mansion. However, the counsel for the respondents contended that the plaintiff cannot be said to have succeeded in establishing their rights to the new room even though these documents are there in his favour and, according to him, the case of the plaintiff is either falsified or it stands disproved by the cross examination of the plaintiff.

8. The basis of the plaintiff's claim and the reason of his entering in the suit room is that the suit room i.e. old Room No.5 was being used as common baithak for the villagers. He has given oral evidence in support of this contention and has produced the documents referred to above. From all of those documents, it has to be mentioned at the out set that the voters lists filed and proved on record by the plaintiff

strongly support his case that the old Room No.5 was being used by the villagers as common baithak, otherwise there was no explanation forthcoming from the respondent/defendant as to how the names of so many persons are shown in each of the voters lists.

. The advocate for the defendant tried to contend that the villagers were permitted to give address of old Room No.5 for the sake of convenience. But when consistently for all the years, of which the lists were filed, the names of number of persons appeared as occupants of old Room No.5, then it is a strong circumstance to support the case of the plaintiff. The counsel for the respondent tried to contend that the defendant was not award as to how those persons got their names entered in the voters lists. But if the state of affairs exists for a considerable period and by that state of affairs it is established that number of villagers or persons were exercising their right in respect of or vis-a-vis old Room No.5, then that is the strong circumstance in favour of the plaintiff.

9. When the origin of the plaintiff's claim stands proved and his entry in the Room No.5 is also established by the aforesaid voters lists, then, in that background, oral evidence has to be scrutinized.

. The counsel for the respondent drew my attention to the cross examination of the plaintiff, wherein, the plaintiff has admitted that there was a common baithak room in Tejukaya Mansion on first floor, the room no. of the said room was 27 and, therefore, he tried to suggest that if already there was being a room on first floor as Room No.27, then the case of the plaintiff that room No.5 was the common room for the villagers stands falsified or nullified. Secondly, he contended that regarding payment of Rs.5000/- towards the contribution to the landlord is not proved by the plaintiff by production of any document. He also contended that the plaintiff does not know the name of the owner or landlord of the building and, he has no documentary evidence to show that he had paid

electric bill or electric meter was standing in his name. He also contended that when one Masurkar inducted in the room by the plaintiff it was the defendant who sought eviction of Masurkar with the help of MHADA and, the plaintiff has admitted that he did not follow the show cause notice proceedings in that regard. From these admissions of the plaintiff, the advocate for the respondent tried to contend that the plaintiff case in Examination-in-chief stands disproved and nullified.

10. I am not in agreement with any of the submissions made by the counsel for the defendant. Once there is strong proof in the possession of the plaintiff in the form of voters lists about use of Room No.5 as common baithak by the villagers, then inability of the plaintiff to have documents in his possession about the payment of Rs.5000/- to the landlord or his non-participation in the proceedings against Masurkar are of no consequences. All these questions of getting possession of vital documents become relevant and important only when the dispute between the parties arose. But prior

to that admittedly , the relation of the plaintiff with Tukaram, - the husband of Sitabai, were cordial. They were having mutual trust and confidence and, therefore, there was no necessity to collect documentary evidence for the contingencies that would be arising in future.

11. It may be that the suit is not filed in representative capacity on behalf of all the villagers. But as rightly explained by the plaintiff, the other villagers may not be interested in claiming the right in this room, that does not affect the individual right of the plaintiff No.1. Because it has to be mentioned here, at this juncture itself that, so far as plaintiff Nos. 2 and 3 are concerned, they do not succeed in establishing their claim in respect of either old room No.5 or new room. But so far as plaintiff No.1 is concerned, he has got number of documents in his possession, as referred to above; that he was the occupant of old room No.5 and that he was also occupying the

transit camp accommodation. The explanation given by the defendant that because of his wife was suffering he was permitted to occupy the transit camp accommodation appears, in the background of the documentary evidence of the plaintiff, to be an afterthought. This defence is raised by the defendant to nullify the claim and contention of the plaintiff.

12. The plaintiff examined one witness Laxman Bhuruk (PW 2) in support of his contention. He was the brother of Tukaram i.e. Defendant/respondent Sitabai was his sister-in-law. He has stated that Govind Narayan was the original tenant in respect of the room and this Room No.5 was used as common baithak of the villagers. He stayed in the room upto 1978 and by consent the tenancy was transferred in the name of Tukaram. He also stated that their association collected Rs.5,000/- for that purpose and, he went to native place in 1978. He has stated that Tukaram came to Mumbai in 1960 and when this witness left the room for the native place he handed over all the documents to him. He also stated that the electricity bills used to come in the name of plaintiff No.1 Dinkar.

. In the cross examination this witness Laxman (PW.2) stated that the association of the villagers was not registered and there were no office bearers and they used to collect contribution only to the extend of meeting the actual expenses such as rent, electricity, maintenance etc. It was suggested to him that this room was acquired by this witness Laxman and Tukaram after spending their savings. He also admitted that if a member retires, he used to leave the room but was not paid any share and he did not enquire about the room after 1978. He was confronted with the affidavit purported to have been singed by him. But he stated that he did not make any affidavit for transferring the room in favour of Tukaram. He denied his signature thereon.

13. To nullify the effect of the evidence of this witness that affidavit marked "X" for identification, the defendant examined one Eknath Walgude who has stated that he was knowing Laxman - the witness of the plaintiff and, Laxman asked him to accompany him to the office of Tahasildar for the purpose of identification. Then witness

Eknath and Laxman went to Tahasildar office. The affidavit of Laxman was produced before Tahasildar Jadhav and, after Laxman signed the same, this witness put his signature. This affidavit was thereafter marked as Exhibit-3

14. In this affidavit Laxman has stated that he was a tenant in respect of Room No.5 Tejukaya Chawl No.2, Lalbaug. The room was secured by himself and his brother Tukaram and, he was given consent in favour of his brother Tukaram by that affidavit so as to enable the Bombay Housing and Area Development Board to transfer his tenancy rights in respect of the said room No.5 in favour of his brother Tukaram. Accordingly the room was transferred in the name of Tukaram. In the affidavit he further stated that Tukaram died on 17th August 1990 and his widow Sitabai has made representation to the MHADA for transferring the tenancy in her favour. Therefore, he is giving the consent to the same. In the judgment, the trial Court held that Laxman was opportunist and his evidence can not be of any use to the plaintiffs.

15. In my opinion, the evidence of Laxman is

not liable to be rejected in its entirety because of his denial of affidavit. It may be that he has executed the said affidavit in favour of Sitabai, but his assertion in the oral evidence that the room was being used as common baithak and the plaintiff was living in the room has to be accepted and can be accepted. Admittedly, according to the plaintiff, all the occupants of room No.5 had given their no objection for transferring the tenancy in favour of Tukaram and, therefore, if Laxman - the real brother of Tukaram, gives his consent in that regard and also subsequently gives in favour of Sitabai, there is no contradiction in the stand of Laxman, nor contradiction in his contention. The court also came to the conclusion that the contents of the affidavit were not material. Therefore, even though Laxman had contradicted himself from his affidavit-Exhibit 3, that cannot be a reason to discard his evidence totally.

16. The plaintiffs also examined one Nandkumar Raje who was working with MHADA and he was asked to produce certain documents in a list of occupants of Tejukaya building prepared by MHADA. His evidence is of no use. Because the

documents produced by him do not show the name of the plaintiff as occupant along with Tukaram.

17. However, it appears that he was examined by the plaintiffs as a witness from MHADA in respect of their contention that because plaintiffs wanted to prove that they had surrendered all the documents viz. electricity bills etc. to MHADA when the process in that regard was started by MHADA. The witness had stated that at the time of preparation of such list, their officers did not collect the documents from the occupants/tenants and such documents were collected only when the MHADA decided to allot the accommodation in transit camp and, he further stated that if Tukaram had submitted such documents and form they must be found with Estate Manager.

18. Defendant No.2 examined Yeshwant Jagdale - the Estate Manager of MHADA. He stated that Tukaram made an application for transit camp accommodation upon receiving vacation notice some time prior to April 1987. In cross examination by the plaintiffs, this witness admitted that the relevant documents that might have been produced

by Tukaram must be with the Estate Manager Allotment (T.C.) and, he further stated that to examine eligibility of a person for allotment of MHADA tenement, he required to submit certain documents and a group photograph of his family members who would occupy the tenement. He pleaded ignorance as to whether Tukaram or defendant No.1 had produced any documents before the Estate Manager. He pleaded ignorance as to when Sitabai came to reside in the transit camp room for the first time after the show cause notice was given.

19. Then Sitabai examined herself. She has stated that she got married to Tukaram in 1969 and then came to Mumbai after two years and stayed in Room No.5. she has stated that by consent of Laxman the rent receipt was transferred in her husband’s name. She admitted that her husband submitted certain documents to MHADA for allotment of transit camp accommodation. She admitted that the plaintiff Dinkar was her husband’s distinct nephew. But, according to her, they had never any occasion to stay in room No.5 or in the transit camp accommodation. She stated that her husband

Tukaram died in 1990 and after his death she stayed at their native place and she suggested to plaintiff No.1 to stay in transit camp accommodation as his wife required medical treatment. She admitted that the plaintiff stayed there for three years. But, according to her, he then shifted his wife to their native place. Then she had stated that she then learnt that plaintiff No.1 Dinkar inducted some tenant in the transit camp accommodation. She therefore came to Mumbai and took possession of the room from Masurkar. She has stated about the affidavit of Laxman and then she has stated that she obtained the new room in May 1998. She has denied the case of the plaintiffs that the room No.5 was used as common baithak. When she cross examined on behalf of the plaintiff, Sitabai stated that she did not know, whether room No.5 was earlier acquired by the villagers as common baithak. She admitted that after Laxman left room No.5 in 1977, the rent receipt was not transferred in the name of her husband. She has stated that when the transit camp was allotted to the husband, her husband and plaintiff No.1 were staying at Mumbai and she was not knowing as to the terms between her husband and Dinkar in

respect of use of transit camp. she did not have any receipt to show that the rent of the transit camp was paid by her husband.

20. The defendant also examined one witness Eknath Walgude. He is the person who accompanied Laxman to the office of Tahasildar to sign the affidavit as an witness. His evidence has already be discussed above.

21. From the aforesaid evidence of the defendant and the cross examination, the counsel for the defendant No.1 Sitabai tried to contend that the case of the plaintiffs has to be held as false and appeal has to be rejected.

22. I am not in agreement with this submission. What emerges from the entire oral evidence is that the plaintiff No.1 was undoubtedly living in old Room No.5 and he lived in the transit camp accommodation for a considerable period, may be about more than three years. He exercised his right over the transit camp by inducting some Masurkar who ultimately evicted by the MHADA. The basis of the plaintiff claim for joint occupation in the newly allotted

room is the right in respect of old room No.5 and, therefore, the plaintiff can succeed if he establishes that he has right to occupy room No.5 and he was getting the said room in his right, then in that case the suit of the plaintiff No.1 was required to be decreed, though the plaintiff Nos. 2 and 3 cannot be said to have established their claim. Neither Tukaram nor his wife can be said to have exclusive right over the room No.5 or in the transit camp accommodation and, the overwhelming evidence of the plaintiff in the form of documents nullifies the case of the defendant No.1 or Tukaram about such an exclusive right. Continuous and consistent occupation by the plaintiff No.1 of room No.5 for a considerable period and his occupation and his occupation of the transit camp for a considerable period coupled with the documentary evidence in his possession in that regard and, the evidence regarding use of the room No.5 as common baithak of the villagers are sufficient circumstances to accept the claim and contentions of the plaintiffs. The trial Court obviously has not considered this important aspect. The finding of the trial Court that the plaintiff has no documentary evidence to show that Room No.5 was

used as common baithak is patently wrong. The voters lists produced and proved by the plaintiff were sufficient for the Court to come to the conclusion in favour of the plaintiffs. As a result, this appeal is required to be allowed, so far as Appellant No.1 is concerned. Hence the order :-

:ORDER:

The appeal is allowed.

The order of dismissal of the suit is set aside and suit is decreed in favour of the appellant/plaintiff No.1 alone.

It is declared that the plaintiff No.1 is entitled to stay, use and occupy the new premises allotted by defendant No.2 in lieu of old premises i.e. Room No.5 of Chawl No.2, Tejukai Mansion, Lalbaug, Mumbai as per prayer (a) and, the plaintiff No.1 will also be entitled for injunction as prayed for.

The respondent No.1 will bear her own

costs and the costs of the plaintiffs through out.

[D.G. DESHPANDE]

07/03/2005 JUDGE.